

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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PAN AMERICAN AIRWAYS CORP.,

Plaintiff/Counter-Defendant

v.

ROBERT E. BARNES

Defendant/Counter-Plaintiff

Case No. 04-CV-10515JLT

**MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISREGARD
PLAINTIFF/COUNTER-DEFENDANT'S DECLARATION IN SUPPORT OF ITS
REPLY TO BARNES' PARTIAL SUMMARY JUDGMENT MOTION.**

INTRODUCTION

On October 4, 2004, Plaintiff, hereinafter "PanAm", has filed its reply in opposition to Defendant Robert Barnes' motion for partial summary judgment. In support for its motion, PanAm filed a memorandum, a statement of material facts and a "Declaration Of Steven Legere". Mr. Legere's Declaration is based on "belief", not on personal knowledge or observation. Declaration of Steven Legere, ¶ 6. All facts in PanAm's statement of material facts, with the exception of facts number 6 and 7, are taken from the original complaint and are not supported by affidavit. All facts alleged in Plaintiff's factual background section of its memorandum in support of its motion, except the last sentence, are taken from Plaintiff's complaint and are not supported by affidavit.

ARGUMENT

The only supporting documentation for Plaintiff's motion in opposition to Defendant's partial summary judgment motion is the declaration of Steven Legere. The applicable Federal Rules require that affidavits must be made on personal knowledge, state facts that would be admissible in evidence and show that the affiant is competent to testify to those facts. Fed.R.Civ.P.56(e). Plaintiff's supporting declaration is neither based on actual knowledge nor personal observation.

Stipulating for the purpose of this motions that Steve Legere is competent and qualified to testify to the facts of his declaration, Legere establishes his qualifications in ¶¶ 1-5 of his declaration and only introduces one fact in his last paragraph, ¶ 6, which is based on "believe" and not "personal knowledge" as required by Fed. R. Civ. P. 56(e). Mr. Legere's declaration does not satisfy the requirements for a supporting affidavit under the Federal Rules, and should not be considered in support of Plaintiff's motion. Affidavits on information and belief are to be disregarded in considering motion for summary judgment. *Shapiro Equipment Corp. v. Morris & Son Constr. Corp* (1976) 369 Mass. 968, 341 NE2d 1066. Allegations made on information and belief are to be disregarded in considering motion for summary judgment. *Jackson v. Hogan* (1983) 388 Mass. 376, 446 NE2d 692.

Furthermore, the only statement of fact in the declaration relevant to the case is Statement No. 6, which states that Robert Barnes, or someone in a like position with similar qualifications, would have known, or should have known of adverse consequences of improper maintenance. This statement does not refute Barnes' facts in his affidavit that he did not intentionally cause any damage to Plaintiff's property. See *United States v One Parcel of Real Property*, 900 F.2d 470, 475 (1st Cir. 1990). Where statements in affidavits did not refute specific facts in affidavits of agents of Plaintiff in support of prima facie case, summary judgment for Plaintiff affirmed.

CONCLUSION

For the reasons and based on the law set forth above, Defendant's motion to disregard Defendant's Declaration should be granted and Plaintiff's request to deny Defendant's partial summary judgment motion should be denied.

October 12, 2004

Respectfully submitted,

Dated: October 12, 2004



Peter Piel
Law Office of Peter Piel
800 Turnpike Street, Suite 300
North Andover, MA 01845
978-794-5513
BBO # 639070

Certificate of Service

I, Peter Piel, hereby certify that a true copy of the above document was served upon John Nadolny, the attorney of record for the Plaintiff, by U.S. mail, postage prepaid on this 12th day of October 2004.

Peter Piel

Peter Piel
Law Office of Peter Piel
800 Turnpike Street, Suite 300
North Andover, MA 01845
978-794-5513
BBO # 639070